

CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

GLORIA SCOTT AND *
DEANIA JACKSON *
* NO. 96-8461
VERSUS * DIVISION "I"
* SECTION 14
THE AMERICAN TOBACCO *
COMPANY, INC., ET AL. *
*
* * * * *

Transcript of proceedings before The
Honorable Richard J. Ganucheau, Judge Pro Tempore,
Civil District Court, Parish of Orleans, State of
Louisiana, 421 Loyola Avenue, New Orleans, Louisiana
70112, commencing on June 18, 2001.

* * * * *
Thursday
February 27, 2003
1:32 p.m.
* * * * *

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24 Your Honor, we'd like to present two
25 documents to the jury at this time. The
26 first document is Document Number 0169.01,
27 and it has been previously admitted.
28 THE COURT:
29 Give me the number again, please.
30 MR. LEGER:
31 0169.01, Your Honor.
32 THE COURT:
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1 And it is in evidence?
2 MR. LEGER:
3 It is in evidence, Your Honor.
4 THE COURT:
5 All right.
6 MR. LEGER:
7 May we publish to the jury, Your Honor?
8 THE COURT:
9 You may publish.
10 MR. LEGER:
11 Your Honor, Scott Exhibit 0169.01. The
12 right-hand corner -- in fact, please
13 highlight the entire top of the document.
14 And you don't need to blow it up. Reads:
15 RJR Confidential Product Research
16 Report, MRD, October 30th, 1975, RJR, from
17 John M. Wallace to Mr. T. L. Ogburn, Jr.
18 Please, Carl, if you would, from share
19 of smokers through the first two paragraphs.
20 Blow that up, please. It's entitled Share of
21 Smokers by Age Group.
22 "This memo is the annual update of
23 trends in share of smokers by age.
24 Information is drawn from the April NFO
25 panels. The tables included are: 1,
26 Winston-Marlboro comparisons, 2, Salem-Kool
27 comparisons, 3, corporate share of smoker
28 comparisons, and 4, smoker share among the
29 top ten brands."
30 Next sentence reads:
31 "Marlboro's traditional source of
32 strength, younger smokers, though still

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1 sizable, is eroding at a rapid rate, between
2 April, 1974 and April, 1975, Marlboro King
3 showed a five share point loss in the 14- to
4 17-year-old age group and since 1973,
5 Marlboro King's share market has declined by
6 eight share points in this segment."
7 At the request of Mr. Wittmann, he's
8 asked me to read the whole thing so they
9 don't have to read anything, Judge. I will
10 read it quickly.
11 "Marlboro King has shown little or no
12 gain in the total 18 to 24 category. Some
13 growth did occur in the 25 to 34 group --
14 possibly indicating an aging of the Marlboro
15 franchise. Winston King did not capitalize
16 on Marlboro's decline, but exhibited some

17 softness itself - especially in the younger
18 age groups (14 to 17 and 21 to 24). Neither
19 Marlboro nor Winston are exhibiting much
20 change in the groups."

21 Next paragraph: "Salem King showed
22 encouraging growth by posting a four share
23 point gain in the 14 to 17 market. There are
24 no changes in the older markets. This growth
25 for Salem occurred at time when Kool King
26 declined substantially in the 14 to 17 market
27 and the 18 to 24 market. Thus, while Salem
28 is beginning to show strength in the younger
29 markets, Kool is showing major signs of
30 weakness in the same markets."

31 Last paragraph: "From a corporate
32 standpoint, RJR and Philip Morris exhibited
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1 general growth in most age groups. (Philip
2 Morris did have a decline in the 14 to 17
3 group, while RJR showed a gain). The other
4 four companies either showed no change or
5 declines in the age groups."

6 May we publish the next page, Your
7 Honor?

8 THE COURT:
9 Yes, you may publish it.

10 MR. LEGER:
11 Simply to illustrate without reading
12 much detail, at the very top, Table I, trends
13 in Winston's share of smokers by age group
14 compared with Marlboro. (Based on spring
15 screenings of the NFO panel in years
16 indicated). At the top, total younger
17 smokers, 14 to 17. Then, the column on the
18 left-hand side shows what it shows, Your
19 Honor, demonstrating under each name 1966,
20 1969, 1972, 1973, 1974 and 1975.

21 Next page, please.

22 THE COURT:
23 You may publish it.

24 MR. LEGER:
25 Thank you, Your Honor.

26 Table II, trends in Salem share of
27 smokers by age group compared with Kool based
28 on spring screenings by NFO panel in years
29 indicated. Total younger smokers, 14 to 17,
30 and similar, Salem King, Salem Superking,
31 total Salem King, Superking, Kool Filter
32 King, Kool Filter Longs, Kool Longs, total

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1 Kool Kings, Longs and Milds, years, as
2 illustrated, Your Honor.

3 Finally, Table III, trends in company
4 shares.

5 THE COURT:
6 You may publish it.

7 MR. LEGER:
8 Sorry, Your Honor. Again, based on
9 spring screenings of the NFO panel in years

10 indicated, showing once again total younger
11 smokers, 14 to 17, and showing companies in
12 the years 1966, 1969, 1972, 1973, 1974, 1975,
13 shares -- expand, please, over into the next
14 columns. We're not going to read the
15 numbers, but just so we can see them. You
16 don't have to highlight them. Just expand --
17 R.J. Reynolds, Philip Morris, Brown and
18 Williamson, American, Lorillard, Liggett &
19 Myers.

20 That, Your Honor, is all from that
21 document.

22 THE COURT:

23 Defendants wish to read any portions of
24 that document to the jury?

25 MR. WITTMANN:

26 No, Your Honor.

27 MR. LEGER:

28 Your Honor, the final document for me,
29 Scott Exhibit Number 4312.01.

30 THE COURT:

31 Is it in evidence?

32 MR. LEGER:

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1 Yes, Your Honor, it is. May we publish?

2 THE COURT:

3 You may publish it.

4 MR. LEGER:

5 Let me know if I'm going too fast,
6 Judge. I'll just trying to outdo your
7 estimation of lawyer time.

8 THE COURT:

9 Good luck.

10 MR. LEGER:

11 Exhibit Number 4312.01. Can you blow
12 the whole thing up, at least, the substance
13 of it? Interoffice correspondence, R.J.
14 Reynolds Tobacco Company, Winston-Salem,
15 North Carolina, 27102, RJR. Date, July 22nd,
16 1980, to Mr. E. A. Horrigan, Jr., from G. H.
17 Long. Subject, MDD report on teenage
18 smokers, 14 to 17. It reads, Your Honor, if
19 I may:

20 "Attached is a MMD report covering the
21 aforementioned subject. Last January, a
22 report was issued on this subject that
23 indicated that Philip Morris had a total
24 share of 59 among 14- to 17-year-old smokers,
25 and specifically, Marlboro had a 52 share.
26 This latest report indicates that Philip
27 Morris' corporate share has increased by
28 about four points; however, Marlboro remains
29 the same at 52.

30 Importantly, the report further
31 indicates that RJR continues to gradually
32 decline, and between the spring and fall 1979

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1 periods, RJR's total share declined from 21.3
2 to 19.9."

3 Can you blowup that last paragraph,
4 please?
5 Hopefully, our various planned
6 activities that will be implemented this fall
7 will aid in some way in reducing or
8 correcting these trends.
9 Signed, Jerry, or JHL.
10 Your Honor, that's all with respect to
11 these exhibits.
12 THE COURT:
13 Defendants wish to display any portion
14 of that exhibit to the jurors?
15 MR. WITTMANN:
16 Not much left, Your Honor, to display.
17 No.
18 MR. LOUIS GERTLER:
19 Good afternoon, ladies and gentlemen.
20 I'm Louis Gertler. I haven't had a chance to
21 introduce myself to you yet, but the first
22 video we're going to show you is only 30
23 minutes. It's a deposition of a Lawrence
24 Gravely, who was a research biologist at
25 Brown and Williamson and later moves into
26 marketing. I apologize, because I think the
27 audio in the beginning is a little scratchy
28 and difficult to understand, but it gets
29 better as the deposition proceeds.
30 So, with that, Your Honor, we'd like to
31 present to the jury the deposition of
32 Lawrence Gravely.

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1 THE COURT:
2 You may proceed.
3 (Videotaped sworn deposition of Lawrence
4 Gravely is played as follows:)
5 QUESTION: What year did you say you
6 went to work for Brown & Williamson?
7 ANSWER: '67.
8 QUESTION: What job title did you
9 first --
10 ANSWER: Biologist.
11 QUESTION: What job duties did you have
12 as a biologist with Brown and Williamson?
13 ANSWER: Just across the spectrum, I did
14 process research and hygiene work, factory
15 hygiene, and things relating to the
16 application of microorganisms to tobacco
17 substrate.
18 QUESTION: What is process research?
19 ANSWER: How to handle tobacco in
20 various ways to make it more amenable to
21 processing.
22 QUESTION: Can you give me an example?
23 ANSWER: I worked on a project that took
24 tobacco raw materials and tried to figure out
25 a way to give them better filling power by
26 different means.
27 QUESTION: Filling power?
28 ANSWER: Yes.
29 QUESTION: What is "filling power"?
30 ANSWER: Filling power is the ability of

31 anything to -- of a given weight to fill up
32 a -- to fill up a volume. So, if you can get
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1 it to fill up a larger volume with the same
2 weight, then you have something with better
3 filling power.

4 QUESTION: Does that concern dyed
5 tobacco?

6 ANSWER: I did not work on the dye
7 process, but they are similar. The concept
8 is similar.

9 QUESTION: The concept is similar to the
10 dye --

11 ANSWER: Yes, but I did not work on the
12 dye.

13 QUESTION: Okay. What specific tobacco
14 or tobacco component did you work on for this
15 filling research?

16 ANSWER: Leaf.

17 QUESTION: Leaf? What exactly were you
18 researching?

19 ANSWER: As we were talking a moment
20 ago, trying to figure out a way to make a
21 given weight of tobacco occupy more space.

22 QUESTION: And why was that an area that
23 you were working on for Brown and Williamson?
24 What was the significance of working on a
25 project like that?

26 ANSWER: Because you could use less
27 tobacco to make a cigarette.

28 QUESTION: And why was that important to
29 Brown and Williamson, if you know?

30 ANSWER: Well, if your raw materials
31 cost you less, then you don't have to put as
32 much into the product.

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1 QUESTION: I think where we left off
2 before we got sidetracked was your initial
3 position at Brown & Williamson, which I think
4 you told me was a --

5 ANSWER: Biologist.

6 QUESTION: -- biologist?

7 ANSWER: Actually, the proper title, I
8 think was research biologist.

9 QUESTION: How long were you a
10 biological researcher?

11 ANSWER: Research biologist?

12 QUESTION: Yes.

13 ANSWER: I don't remember what my title
14 changed or not, but I stayed in research
15 develop for eight -- for twelve years, excuse
16 me.

17 QUESTION: And you say you started at
18 Brown and Williamson in 1967?

19 ANSWER: Seven, in June.

20 QUESTION: So this brings us up to about
21 1979.

22 ANSWER: That's right.

23 QUESTION: Did your job title change in

24 1979?
25 ANSWER: I transferred departments and
26 went to Marketing Research.
27 QUESTION: Was the Marketing Research
28 Department also in Louisville?
29 ANSWER: It was at the time.
30 QUESTION: What job title did you assume
31 in the Marketing Research Department?
32 ANSWER: Probably Marketing Research
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1 analyst. That's where -- when they brought
2 new people into that department, that's what
3 they started them at no matter what their
4 background was.
5 QUESTION: And what kind of job duties
6 did you perform as a Marketing Research and a
7 list?
8 ANSWER: I began work on the consumer
9 product testing area and worked on that
10 for -- exclusively for two or three years.
11 QUESTION: What kind of consumer product
12 testing did you do?
13 ANSWER: Generally when the company
14 wanted to test a product amongst consumers,
15 our department would do it.
16 QUESTION: Are these like smoke
17 evaluation panels, or what kind of testing
18 would you do?
19 ANSWER: You would give consumers
20 somewhere across the country variously
21 distributed product to smoke, and you would
22 talk to them about what they thought of the
23 products.
24 QUESTION: How long were you in the
25 Marketing Department at B & W?
26 ANSWER: Until March of 1995. I was in
27 Marketing Research.
28 QUESTION: So you were in Marketing
29 Research from 1979 to 1995?
30 ANSWER: Yes.
31 QUESTION: I take it, then, 1995, you
32 left B & W?

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1 ANSWER: I did.
2 QUESTION: All right. Mr. Gravely, I'm
3 going to hand you a document which has been
4 marked as Plaintiffs' Exhibit 1, which
5 appears to be a patent from the U.S. patent
6 and trademark office website, Number 4037609,
7 dated July 26th, 1977.
8 Now, you stated you recognize this
9 document, Mr. Gravely?
10 ANSWER: Yeah. It looks like one of the
11 patents, yes, given the claim section, yes.
12 QUESTION: Yeah. It's titled -- well,
13 right underneath the patent number and date
14 it says, "Process for reduction of nicotine
15 content of tobacco by microbial treatment."
16 ANSWER: Yes.

17 QUESTION: Do you see that?
18 ANSWER: Yes.
19 QUESTION: Was that the area of research
20 you described earlier?
21 ANSWER: That's it.
22 QUESTION: Now, do you see where there's
23 a list of inventors on Page 1?
24 ANSWER: Yes, I do.
25 QUESTION: And one of the inventors is
26 listed as Lawrence E. Gravely?
27 ANSWER: Yes.
28 QUESTION: Is that you, sir?
29 ANSWER: That is.
30 QUESTION: The other three inventors are
31 Richard P. Newton; Vernon L. Geiss,
32 G-E-I-S-S; and John J. Jewell, J-E-W-E-L-L.
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1 Could you identify these three other
2 gentlemen?
3 ANSWER: As to them being inventors?
4 Yes. Yes.
5 QUESTION: Who is Richard P. Newton, or
6 who was Richard P. Newton?
7 ANSWER: I worked for him at one time or
8 another in R & D, Research and Development.
9 QUESTION: At Brown and Williamson?
10 ANSWER: Yes.
11 QUESTION: Do you remember what his job
12 title was?
13 ANSWER: I do not.
14 QUESTION: Did he work at Brown and
15 Williamson in Research and Development in
16 1977?
17 ANSWER: Yes.
18 QUESTION: Who was Vernon L. Geiss?
19 ANSWER: He was a biochemist.
20 QUESTION: At Brown and Williamson?
21 ANSWER: At Brown and Williamson.
22 QUESTION: Did you also work with him
23 during your time --
24 ANSWER: I did.
25 QUESTION: -- at Brown and Williamson?
26 ANSWER: I did.
27 QUESTION: Who was John N. Jewell?
28 ANSWER: He worked at Brown and
29 Williamson in Research and Development.
30 QUESTION: With you?
31 ANSWER: No.
32 QUESTION: What areas did he work in?
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1 ANSWER: He was an engineer. So if
2 you're asking did he work immediately with
3 me, the answer's no. Did he work with me
4 relative to this, the answer's yes.
5 QUESTION: So all three of these
6 gentlemen worked with you on this process
7 which is described in the patent?
8 ANSWER: Yes.
9 QUESTION: And you all worked together

10 on this process while you were employees at
11 Brown and Williamson?
12 ANSWER: Yes.
13 QUESTION: I notice it says, "Assignee:
14 Brown and Williamson Tobacco Corporation,
15 Louisville, Kentucky."
16 ANSWER: Yes.
17 QUESTION: Do you see that?
18 ANSWER: Yes.
19 QUESTION: It's my understanding that
20 assignee means that Brown and Williamson
21 owned this patent?
22 ANSWER: That is correct.
23 QUESTION: Let's talk a little bit about
24 this process that you all invented. Now,
25 this process allowed for the reduction of
26 nicotine content of tobacco without loss of
27 desirable flavor, taste and smoking
28 properties; is that correct?
29 ANSWER: That was the objective -- yes.
30 Sorry.
31 QUESTION: Now, this technique allowed
32 the removal of nicotine from tobacco without
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1 a loss of tobacco mass.
2 ANSWER: Yes.
3 QUESTION: Is that correct?
4 ANSWER: (Nods head affirmatively.)
5 QUESTION: And it also allowed nicotine
6 content to be reduced in relatively short
7 time?
8 ANSWER: Yes.
9 QUESTION: Now, this process produced a
10 mild smoke --
11 ANSWER: Right.
12 QUESTION: -- is that correct?
13 ANSWER: (Nods head affirmatively.) A
14 milder smoke, yes.
15 QUESTION: This process also reduced the
16 irritating properties of smoke somewhat,
17 correct?
18 ANSWER: Yes, I believe that is correct.
19 QUESTION: Well, it was readily -- this
20 process could be readily incorporated into
21 conventional techniques --
22 ANSWER: Right.
23 QUESTION: -- for producing cigarettes,
24 correct?
25 ANSWER: Yes.
26 QUESTION: Now, this microbial process
27 was also highly suitable for using in
28 manufacture --
29 ANSWER: Okay.
30 QUESTION: -- is that correct?
31 ANSWER: Yes.
32 QUESTION: Now, throughout the patent it
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1 states that when this process is used,
2 there's no loss of desirable flavor, taste

3 and smoking properties --
4 ANSWER: Right.
5 QUESTION: -- is that correct.
6 ANSWER: That's correct.
7 QUESTION: How did y'all know that?
8 ANSWER: Had consumers smoke it.
9 QUESTION: Your consumers smoked the
10 tobacco treated by this microbial --
11 ANSWER: Right.
12 QUESTION: -- process? How would you
13 have consumers test this tobacco?
14 ANSWER: It would have been put into a
15 blend against the control with the
16 appropriate control blend so that the only
17 difference was the treated product, the
18 treated materials, and have them smoke it
19 blind under the appropriate conditions so
20 that they -- the conditions wouldn't affect
21 the results that they produced.
22 QUESTION: Do you remember these types
23 of consumer tests?
24 ANSWER: Product would have been
25 unlabeled except for a code, they would be
26 asked to smoke them in a quiet room where
27 there's no disturbance, and asked to just
28 smoke and probably fill out a questionnaire
29 about what they thought of one versus the
30 other.
31 QUESTION: Do you personally remember
32 these types of tests occurring at the time
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1 you were developing this process?
2 ANSWER: There was an internal panel
3 that did stuff like that, yes. But beyond
4 that, I --
5 QUESTION: What is an internal panel?
6 ANSWER: A group of people who were
7 brought together to assess products.
8 QUESTION: You have no reason to dispute
9 that panel members smoked cigarettes in which
10 nicotine has been substantially degraded
11 upwards of 67 percent and reported that there
12 was no loss of desirable flavor, taste and
13 smoke properties?
14 ANSWER: None at all.
15 QUESTION: You don't dispute that fact?
16 ANSWER: (Shakes head negatively.)
17 QUESTION: Would you dispute the fact
18 that a smokers' test panel smoked cigarettes
19 in which nicotine had been degraded above 90
20 percent and still reported no loss of
21 desirable flavor, taste and smoking
22 properties?
23 ANSWER: No, I wouldn't. There's a
24 second part to that answer, though.
25 QUESTION: Okay.
26 ANSWER: It depends on how it was
27 blended.
28 QUESTION: Could you explain?
29 ANSWER: Just whatever mixture you put
30 together in terms of a blend. That is, just

31 because you have that end result, you may not
32 always get the end result that you desire in
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1 the finished product because of what you add
2 to it in a blend. That's all.

3 QUESTION: How does that qualify your
4 previous answer? I'm not understanding that.

5 ANSWER: Read back the question.

6 QUESTION: No, I don't want to do that.
7 Let me see if I can work through this with
8 you. Let me see if I understand what you're
9 saying. Are you telling me that the consumer
10 acceptance depended on the blend of the
11 cigarette they were smoking?

12 ANSWER: By all means.

13 QUESTION: And we can assume, can't we,
14 that the blend of cigarette they were smoking
15 in regard to this patent was a blend which
16 contained tobacco which had been treated with
17 this microbial treatment in order to degrade
18 the nicotine --

19 ANSWER: Yes.

20 QUESTION: -- is that correct?

21 ANSWER: Yes.

22 QUESTION: Prior to the break I showed
23 you another patent which I obtained from the
24 U.S. Patent and Trademark Office website, and
25 it's Numbered 403993, dated August 2nd, 1977,
26 entitled "Process for reduction of nicotine
27 content of tobacco by microbial treatment."

28 ANSWER: Yes, I recognize it.

29 QUESTION: Now, in the front of the
30 document it lists the inventors as Vernon L.
31 Geiss, G-E-I-S-S; Charles F. Gregory; Richard
32 P. Newton; and Lawrence E. Gravely. I assume

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1 that the Lawrence E. Gravely listed as an
2 inventor is yourself?

3 ANSWER: Yes.

4 QUESTION: Do you remember inventing the
5 process described in this particular patent?

6 ANSWER: Yes.

7 QUESTION: Now, it says, "Assignee:
8 Brown and Williamson Tobacco Corporation."
9 Do you see that on the front page?

10 ANSWER: Yes.

11 QUESTION: Would you agree that Brown
12 and Williamson Tobacco Corporation owned this
13 patent?

14 ANSWER: Yes.

15 QUESTION: The process described in this
16 patent was invented during your tenure at
17 Brown and Williamson?

18 ANSWER: Yes.

19 QUESTION: Now, again, this was a
20 process in which microorganisms, like
21 bacteria, were used on tobacco to reduce
22 significantly the nicotine content in
23 tobacco; is that correct?

24 ANSWER: Yes.
25 QUESTION: And, finally, sir, would you
26 agree that this process was highly suitable
27 for use in the manufacture of tobacco smoke
28 products?
29 ANSWER: Yes.
30 QUESTION: Now, this process did not
31 increase tobacco processing times by an
32 impractical amount, did it?
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1 ANSWER: It did not.
2 QUESTION: And it also did not involve
3 significant energy output because the
4 microorganisms fed on or obtained their
5 energy from the nicotine itself; is that
6 correct?
7 ANSWER: That is correct.
8 QUESTION: This process also did not
9 lead to a significant loss of tobacco mass.
10 ANSWER: That's correct.
11 QUESTION: Let me rephrase the question.
12 Did B & W ever incorporate the process of
13 reducing the nicotine content of tobacco by
14 microbial treatment in regard to their
15 commercial cigarettes?
16 ANSWER: Not to my knowledge.
17 QUESTION: Did you ever talk with any of
18 your fellow co-employees at Brown and
19 Williamson while you were there about the
20 fact that Brown and Williamson was not
21 implementing this process in regard to their
22 commercial cigarettes?
23 ANSWER: I'm sure that we had
24 conversations around the subject of whether
25 or not they were going to utilize it in the
26 manufacturing and processing; but beyond
27 that, no.
28 QUESTION: So during your entire tenure
29 at Brown and Williamson, to your knowledge,
30 Brown and Williamson did not implement this
31 process into the -- their manufacture of
32 commercial cigarettes?

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1 ANSWER: Not this process, no.
2 QUESTION: In your opinion, why did
3 B & W not implement the process reflected in
4 patents 1 and 2 that we've discussed into
5 their commercial manufacturing process?
6 ANSWER: I have no idea.
7 QUESTION: It is another patent which I
8 obtained from the website for the U.S. Patent
9 and Trademark Office. It is Patent Number
10 4140136 dated February 20th, 1979, entitled
11 "Process for reduction of nicotine content of
12 tobacco by microbial treatment." And I'll
13 ask you to look at this patent and tell me if
14 you recognize it.
15 Now, sir, does this -- does Plaintiffs'
16 Exhibit 3 reflect an improvement on the

17 process of reducing nicotine content of
18 tobacco by microbial treatment which we've
19 discussed in regard to the two previous
20 patents?
21 ANSWER: Yes, but I can't tell you
22 sitting here what that improvement is in the
23 third patent. I don't remember.
24 QUESTION: And, sir, are you listed as
25 an inventor of this process which is
26 described in the patent which we've marked as
27 Plaintiffs' Exhibit 3?
28 ANSWER: Yes.
29 QUESTION: And, again, this patent
30 describes an improvement to the process of
31 reducing the nicotine content of tobacco by
32 use of microorganisms to degrade that

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1 nicotine in the tobacco, correct?
2 ANSWER: Yes.
3 QUESTION: Would you agree that tobacco
4 which is treated with this process also gives
5 reduced nicotine deliveries to the smoker,
6 correct?
7 ANSWER: Yes.
8 QUESTION: And this is a -- another
9 patent obtained from the U.S. Patent and
10 Trademark Office website which is Numbered
11 4151848, dated May 1st, 1979, and entitled
12 "Tobacco with reduced nicotine content due to
13 microbial treatment."
14 I ask you to look at that patent and
15 tell me if you recognize it.
16 Okay. Do you recognize that patent?
17 ANSWER: Yes.
18 QUESTION: Are you listed as an inventor
19 of that patent?
20 ANSWER: Yes.
21 QUESTION: And is the assignee on this
22 patent Brown and Williamson Tobacco
23 Corporation?
24 ANSWER: Yes.
25 QUESTION: And does this patent reflect
26 further improvements to the process of
27 removing nicotine from tobacco by use of
28 microorganisms we've been talking about
29 today?
30 ANSWER: Yes.
31 QUESTION: And, again, as reflected in
32 this patent, nicotine can be substantially

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1 reduced by use of microorganisms without loss
2 of desirable flavor, taste and smoking
3 properties --
4 ANSWER: Yes.
5 QUESTION: -- correct?
6 ANSWER: That's correct.
7 QUESTION: And the process described in
8 this particular patent is also readily -- can
9 also be readily incorporated into the

10 conventional technique of processing tobacco,
11 correct?
12 ANSWER: Yes.
13 QUESTION: And the process described in
14 this patent is also highly suitable for use
15 in the manufacture of tobacco smoke
16 products --
17 ANSWER: Yes.
18 QUESTION: Correct? And, again, let me
19 ask you, in terms of -- in regard to this
20 process which is reflected in the patent
21 we're looking at right now, was this process
22 ever incorporated into the commercial
23 production of cigarettes at B & W while you
24 were there?
25 ANSWER: Not that I'm aware of.
26 QUESTION: Mr. Gravely, I'd like to show
27 you a document which is also a patent
28 obtained from the U.S. Patent and Trademark
29 Office website dated December 3rd, 1985,
30 Number 4556073, entitled "Process for
31 reduction of nitrate content of tobacco by
32 microbial treatment."

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1 Now, does this patent describe a process
2 for the reduction of nitrate content of
3 tobacco materials by microbial treatment?
4 ANSWER: Yes.
5 QUESTION: And is the assignee of this
6 patent Brown and Williamson Tobacco
7 Corporation, Louisville, Kentucky?
8 ANSWER: Yes.
9 QUESTION: And do you remember inventing
10 the process which is the subject of this
11 patent?
12 ANSWER: Yes.
13 QUESTION: You do agree, though, that it
14 is alleged that nitrates give rise to
15 tobacco-specific nitrosamines upon paralysis
16 of tobacco?
17 ANSWER: It's, I believe, alleged in the
18 literature, but I do not recall where it does
19 that.
20 QUESTION: And you would agree, sir,
21 that when this process is used to reduce
22 nitrates, there's no loss of desirable
23 flavor, taste and smoking properties in the
24 tobacco smoke?
25 ANSWER: Well, you'll have to show me
26 the example where that was done. I do not
27 remember that.
28 QUESTION: Page 4, in the section Field
29 of Invention, do you see that section, sir?
30 ANSWER: Yes.
31 QUESTION: I'm going to read it for the
32 record, and correct me if I misstate

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1 anything.
2 "The present invention relates to a

3 process for reducing the nitrate content of
4 tobacco materials by treating the tobacco
5 with cultures of microorganisms. More
6 specifically, the invention relates to a
7 process for treating tobacco materials to
8 reduce the nitrate content thereof, which,
9 when incorporated into a tobacco smoking
10 product, yield smoke with reduced nitrogen
11 oxides and hydrogen cyanide deliveries
12 without loss of desirable flavor and taste
13 properties or other smoke qualities."
14 ANSWER: It does say that, yes.
15 QUESTION: Does that refresh your
16 memory?
17 ANSWER: It does say that, yes.
18 QUESTION: And do you remember that to
19 be case when you invented this?
20 ANSWER: Yes.
21 QUESTION: This will be Plaintiffs'
22 Exhibit 8. It is a patent numbered 4557280,
23 dated December 10th, 1985, entitled "Process
24 for reduction of nitrate and nicotine content
25 of tobacco by microbial treatment." I'd like
26 to show you that document. It's a 20-page
27 document.
28 Do you remember inventing the process
29 which is the subject of that particular
30 patent?
31 ANSWER: Yes.
32 QUESTION: And, in fact, you are listed
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1 as one of the inventors on the face the of
2 the patent, correct?
3 ANSWER: Yes.
4 QUESTION: And the assignee is Brown and
5 Williamson Tobacco Corporation?
6 ANSWER: Yes.
7 QUESTION: Now, this is a process for
8 the reduction of both nitrate and nicotine
9 content of tobacco by use of microorganisms,
10 correct?
11 ANSWER: That is correct.
12 QUESTION: And this process allows for
13 the substantial reduction of nitrate and
14 nicotine content of tobacco, correct?
15 ANSWER: Correct.
16 QUESTION: And it allows for a
17 substantial reduction without a loss of
18 desirable flavor, taste and smoke properties,
19 correct?
20 ANSWER: Correct.
21 QUESTION: And this process is easily
22 usable in the manufacturing process of
23 commercial cigarettes, correct?
24 ANSWER: Yes.
25 QUESTION: Now, was this process which
26 is the subject of this patent ever
27 incorporated by B & W into their manufacture
28 of commercial cigarettes, to your knowledge?
29 ANSWER: Not to my knowledge.
30 QUESTION: All right. Let's go on to

31 the next document. This is a document I will
32 mark as Plaintiffs' Exhibit 10, for purposes
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1 of attaching it to the deposition.
2 And I would ask you to look at this
3 document. It's an August 6th, 1985,
4 memorandum, and tell me if you recognize it.
5 Do you recognize that document, sir?
6 ANSWER: Yes.
7 QUESTION: This is a memorandum from J.
8 D. Woods to A. G. Forsythe, correct?
9 ANSWER: That's correct.
10 QUESTION: Who was J. D. Woods?
11 ANSWER: He was a researcher in Market
12 Research Department.
13 QUESTION: For Brown and Williamson?
14 ANSWER: Yes.
15 QUESTION: And who was A. J. Forsythe?
16 ANSWER: A. G. Forsythe --
17 QUESTION: A. G. Forsythe.
18 ANSWER: -- was in marketing and worked
19 in Kool.
20 QUESTION: For Brown and Williamson?
21 ANSWER: Correct.
22 QUESTION: And does this document
23 reflect that you were sent a copy of it at
24 the time?
25 ANSWER: It does.
26 QUESTION: Do you remember receiving a
27 copy of this memo?
28 ANSWER: Actually, yes, I do.
29 QUESTION: And you received it during
30 your course and scope of business at Brown
31 and Williamson?
32 ANSWER: Yes.

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1 QUESTION: Why do you remember this
2 particular document?
3 ANSWER: Because it -- it looks -- it
4 looks familiar and the subject is familiar.
5 QUESTION: What is the subject?
6 ANSWER: Kool's black franchise
7 QUESTION: Why is that familiar, sir?
8 ANSWER: Because Kool has a rather
9 sizable ethnic franchise in the black
10 community.
11 QUESTION: In fact, this document
12 reflects that at the time, in 1985, 40.5
13 percent of Kool smokers were blacks; is that
14 correct?
15 ANSWER: That's correct.
16 QUESTION: And that blacks accounted for
17 36.5 percent of the volume of sales of Kool
18 cigarettes?
19 ANSWER: According to the data shown
20 here, yes.
21 QUESTION: Do you remember that -- do
22 you have any reason to dispute that data?
23 ANSWER: No.

24 QUESTION: Do you remember that to be
25 the case when you were at Brown and
26 Williamson?
27 ANSWER: I don't remember the exact
28 figures, but I know that Kool has a rather
29 large black franchise.
30 QUESTION: When you were at Brown and
31 Williamson, do you remember marketing efforts
32 being made to market Kool cigarettes
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1 specifically to the African-American
2 community?
3 ANSWER: I remember all kinds of
4 marketing programs. I don't remember whether
5 there was anything specifically addressed
6 only to the black community.
7 QUESTION: Now, let's look at Page 3.
8 Do you see the section entitled "Black"?
9 ANSWER: Yes.
10 QUESTION: Now, that obviously refers to
11 black people, correct?
12 ANSWER: Of course.
13 QUESTION: And according to this table,
14 16.5 percent of all black smokers are between
15 the ages of 15 to 19; is that correct?
16 ANSWER: Yeah.
17 QUESTION: So, this table reflects at
18 least as in 1985 that 16.5 percent of all
19 black smokers were between the ages of 15 and
20 19 years old?
21 ANSWER: That's what the data says.
22 QUESTION: What does the 467 in the next
23 column reflect.
24 ANSWER: That's an estimated number
25 based on the U.S. census population
26 distribution of the number of smokers 15 to
27 19 years of age.
28 QUESTION: So the 467 reflects 467,000.
29 ANSWER: Thousand.
30 QUESTION: -- black smokers between the
31 ages of 15 and 19?
32 ANSWER: Yes.

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1 QUESTION: What does the next number,
2 8.8 reflect?
3 ANSWER: Number of cigarettes smoked per
4 day on average for the group in question,
5 whether it's that or any other on the page.
6 QUESTION: So that 8.8 in the black 15
7 to 19 category reflects that blacks 15 to 19
8 who were smokers smoke 8.8 cigarettes a day?
9 ANSWER: Yes.
10 QUESTION: And what about the next
11 number, 4,110?
12 ANSWER: That's the result of taking the
13 consumption per day and multiplying it times
14 the number of smokers to reflect the number
15 of sticks per day that they would smoke if
16 the numbers were correct.

17 QUESTION: So, in the column blacks 15
18 to 19, what does that number reflect?
19 ANSWER: That that smoking group, 15 to
20 19, by mathematically, smokes 4.1 million
21 cigarettes per day.
22 QUESTION: And, finally, the last number
23 in the column under the -- I'm sorry, the
24 1500004 in the column for blacks 15 to 19,
25 what does that reflect?
26 ANSWER: That's an -- that's an
27 extrapolation of the population data and the
28 consumption per day, and that extrapolation
29 says there's a consumption of 1.5 billion
30 cigarettes per day -- sorry, per year, excuse
31 me.
32 QUESTION: So, blacks 15 to 19 in 1985

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1 smoke 1.5 million cigarettes a year,
2 according to this data?
3 ANSWER: Billion.
4 QUESTION: One point five billion
5 cigarettes a year?
6 ANSWER: Yes.
7 (Conclusion of videotaped deposition
8 of Lawrence Gravely.)
9 (Open court.)
10 MR. LOUIS GERTLER:
11 That concludes the Lawrence Gravely
12 deposition, Your Honor. We have one more
13 short one. It's only about 20 minutes long.
14 It's a deposition of a lady named Claudia
15 Corky Newton, also in the B & W Marketing
16 Department. She was a marketing executive, I
17 believe, for several decades, up until the
18 '90s.

19 THE COURT:
20 All right. You may proceed.
21 (Videotaped sworn deposition of Claudia
22 Corky Newton is played as follows:)
23 QUESTION: And then from being involved
24 in special projects, what was your next
25 occupation at Brown and Williamson?
26 ANSWER: I guess my next assignment was
27 to work in the corporate planning group to
28 put together -- to help put together a
29 competitive analysis report.
30 QUESTION: What year was that?
31 ANSWER: That was right after -- it
32 would have been mid to late '80s, I guess.

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1 QUESTION: What is a corporate and
2 competitive analysis report?
3 ANSWER: Well, what I did was to try to
4 gather as much information from the public
5 arena as I could on what our competitors were
6 doing. That would have involved public
7 announcements about management structure. It
8 would have involved information that was
9 known about the new brand launches,

10 information from our own tracking studies
11 about brand performance, and other similar
12 information that could help us in developing
13 our own strategies by understanding the
14 strengths and weaknesses of our competitors.
15 QUESTION: The question is, in the '60s,
16 '70s and '80s, did Brown and Williamson
17 target youth with regards to marketing their
18 commercially sold cigarettes?
19 ANSWER: I'm not aware that we targeted
20 youth in that period of time.
21 QUESTION: Okay. What is your
22 definition of youth?
23 ANSWER: Youth would be anybody under
24 the legal age of smoking.
25 QUESTION: Did Brown and Williamson
26 tobacco ever use Willie the Penguin to market
27 their commercially available cigarettes?
28 ANSWER: Of course, we did.
29 QUESTION: When was that?
30 ANSWER: It was decades ago.
31 QUESTION: '70s? '80s?
32 ANSWER: I can't pinpoint it. I don't

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1 know. I know it was a long time ago.
2 QUESTION: Do you think an adult would
3 purchase cigarettes because of a talking
4 penguin?
5 MR. DEVEREAUX: Object to the form.
6 ANSWER: I don't know what the appeal of
7 the penguin was. I know that Willie the
8 Penguin was the spokesperson for Kool
9 cigarettes. It made sense to me that a
10 penguin should represent a product that was
11 heavily mentholated, because menthol has to
12 do with coolness and a penguin certainly
13 represents coolness.
14 QUESTION: Well, what is a replacement
15 smoker? Did you ever hear that definition
16 before?
17 ANSWER: I have heard the term
18 replacement smoker meaning a new consumer to
19 replace a person who has either quit or
20 died --
21 QUESTION: At what age do people, the
22 predominant number of people, start smoking?
23 ANSWER: According to the Surgeon
24 General, according to the Centers for Disease
25 Control and Prevention, most people start
26 smoking under the age of 18; but I only
27 became aware of this information over the
28 past couple of years, not at the time I was
29 in the position you referred to in Marketing
30 Research.
31 QUESTION: In other words, as former
32 director of Marketing Research at Brown and

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1 Williamson Tobacco, it is your testimony
2 today that you had no idea that people began

3 to start smoking under the age of 18 between
4 1988 and 1992?
5 ANSWER: What I'm saying is that that is
6 not a question that I ever explored either
7 through outside reading or through direct
8 research, that our focus was on switchers who
9 were adult smokers of competitive brands and
10 on people of the age of 21 or up, which is
11 the limit of our research audience, to
12 determine which brands they started smoking.
13 QUESTION: And is it true that most
14 brand loyalty begins to form in the early
15 years of smoking?
16 ANSWER: Yes, it is true that cigarette
17 smokers are highly brand loyal and that brand
18 loyalty forms early.
19 QUESTION: Isn't it true that Brown and
20 Williamson targeted and attempted to attract
21 starter smokers? And then we'll talk about
22 adults.
23 ANSWER: As far as I know, Brown and
24 Williamson did not attempt to influence
25 anybody to start smoking. What we did was to
26 try to influence brand choice among people
27 who had decided to start smoking.
28 QUESTION: I'm going to show you what's
29 marked P-13 for identification. Do you
30 recognize that as a Brown and Williamson
31 document?
32 ANSWER: Yes, I do.

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1 QUESTION: It's a Scott Exhibit 2170;
2 isn't that correct?
3 The subject of this says, are starters
4 young or old? It is dated April 19th, 1985.
5 ANSWER: Yes.
6 QUESTION: And this is some of the data
7 that you probably were referring to in the
8 1984 brand switching study?
9 ANSWER: Yes.
10 QUESTION: Okay. And the findings in
11 this memo, is it not correct, that starters
12 are from the age of 16 to 25?
13 ANSWER: Yes, that over 50 percent are
14 in the age range 16 to 25.
15 QUESTION: Is a 16-year-old a teenager
16 under your definition?
17 ANSWER: Of course.
18 QUESTION: Let me try to understand your
19 testimony. Brown and Williamson paid for 25
20 years of brand switching study, and one of
21 the categories were 16-, 17-, 18-, 19-,
22 20-year-olds. We just talked about the fact
23 that during that period of time, these young
24 people established a brand loyalty, and Brown
25 and Williamson Tobacco did nothing with this
26 study. They just looked at it. They didn't
27 use it to target this audience to get them to
28 smoke their cigarettes?
29 ANSWER: I'm going to try to be
30 responsive, but that was a very long

31 question.
32 QUESTION: It was.
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1 ANSWER: The age group here, 16 to 25,
2 was a group of smokers that we look at. We
3 couldn't distinguish between the 16-year-olds
4 and the 17-year-olds versus the 18-, 19-
5 through 25-year-olds in this study. They
6 were put together as a group. And when we
7 looked at this information historically, they
8 represented the youngest age bracket that was
9 included in the study. In developing
10 marketing programs, the marketing programs
11 were not aimed at people under the age of 21,
12 which is our marketing policy.

13 So, this information was used for
14 tracking, for analysis, but the development
15 of marketing programs had a limit that was
16 different than the age limits used for
17 tracking information at that time.

18 QUESTION: Was it important for Brown
19 and Williamson to know the population of the
20 age group of 14 to 24 when they were looking
21 at the importance of the young adult
22 cigarette market?

23 ANSWER: I don't remember our analyzing
24 information starting at 14 years old. I
25 think our information began at 16. I also
26 don't remember putting together the brand
27 switcher study with population data.

28 QUESTION: Was it important for Brown
29 and Williamson to know their share of the
30 youth market as it applies to other
31 competitive brands?

32 ANSWER: The terminology youth market
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1 here is hard for me to understand. What I
2 see is that there is an age category that
3 ranges from 14 to 24. That's 11 years' span.
4 The consumers that we would have been
5 interested in would have been the subset of
6 that group of people who were of legal age to
7 smoke, and even beyond that, people to whom
8 we would aim our marketing who would be
9 older.

10 Yes, it would be important to know what
11 was happening in the cigarette category.

12 QUESTION: These are the smokers of the
13 future; isn't that correct? Ages 14 through
14 24, those are the years where brand loyalty
15 is established; isn't that correct?

16 ANSWER: According to current research
17 that people do begin to smoke as early as 12,
18 so there is certainly an influence there.

19 QUESTION: Let me show you another
20 document. You are probably more familiar
21 with this document. We are looking at P-14
22 for identification. It is a Scott document.
23 Would you take a look at it quickly? Is this

24 a Brown and Williamson document, brand
25 switching study, Kool 84?
26 ANSWER: I can't tell yet. I think it.
27 QUESTION: You've seen this before?
28 ANSWER: I am not sure that I recognize
29 this particular document, no, but it does
30 seem to be based on the brand switching
31 study.
32 QUESTION: It has to do with brand
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1 demographics and age and sex?
2 ANSWER: Yes.
3 QUESTION: It also has information on
4 Winston and Marlboro, Kools and Salems?
5 ANSWER: Yes.
6 QUESTION: So, Brown and Williamson did
7 compare themselves in terms of age brackets
8 to other particular type of brands based on
9 this document?
10 ANSWER: Yes. We did compare our brands
11 to competitive brands, yes.
12 QUESTION: Now, if you look at the first
13 page, it says cigarette brand switching
14 studies and it is the brand performance, and
15 this study was also analyzed by male/female,
16 various age groups, loyal smokers and
17 starting smokers, correct?
18 ANSWER: Correct.
19 QUESTION: Okay. So, are you familiar
20 with this document now that I've refreshed
21 your recollection?
22 ANSWER: No. I still don't remember
23 seeing this particular document before, but I
24 understand the terminology.
25 QUESTION: It says Kool has young age
26 profile. The largest portion of Kool smokers
27 are between 16 and 25 years of age. Why do
28 you think that is?
29 ANSWER: Well, according to this study,
30 that's -- that is what the study showed, that
31 the largest proportion of Kool smokers were
32 in that age bracket.

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1 QUESTION: This is a switching study.
2 Why do you think it came to be that many
3 young teenagers and young adults switched to
4 Kool between the age of 16 and 25?
5 ANSWER: This doesn't mean that they
6 switched to Kool between 16 and 25. It
7 indicates that they were, during the one-year
8 period when the study was conducted, that
9 they were currently Kool smokers. What it
10 does is to analyze of all the people that
11 said they were Kool smokers, what percentage
12 of them were in the 16- to 25-year-old
13 bracket.
14 QUESTION: That document is entitled
15 what?
16 ANSWER: Target Audience Appendix.

17 QUESTION: Okay. And what is the target
18 audience for?

19 ANSWER: This document describes a
20 target audience for a sampling effort on Kool
21 King Sized.

22 QUESTION: What are the age brackets
23 that are shown here? It says men 15 to 24;
24 is that correct?

25 ANSWER: Right. I'm just trying to get
26 the context, so if you could give me a moment
27 to read it here, I would appreciate it.

28 What it says is that the target audience
29 should be based on an understanding of these
30 statistics. And then the statistics that are
31 offered range from 15 to 24, 25 to 34, 35 to
32 49 and 50 plus.

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1 QUESTION: It says in the middle
2 paragraph, the target audience should be
3 designed recognizing that the following pool
4 of switching smokers will exist in 1975 by
5 Brown and Williamson projections.

6 ANSWER: Yes.

7 QUESTION: So, you are analyzing a
8 target market of men and woman ages 15, now,
9 to 24?

10 ANSWER: Well it is 16 at the bottom of
11 the page. It's 15 at the top of the page. I
12 don't know why those are different, but the
13 part that refers to projecting the pool of
14 switching smokers uses the age category 16 to
15 25, which can't be broken down further.

16 QUESTION: Well, why use an age bracket
17 where half the bracket is teenagers if you're
18 not going to use it in developing your
19 marketing and advertising plans?

20 ANSWER: I am not sure that the logic
21 that was used in collecting information on
22 16-year-olds and up during this period of
23 time, but I believe that it was used to
24 analyze what was happening in the
25 marketplace. Separate from that, when we
26 developed plans for appealing to smokers to
27 try to get them to switch to our brands or
28 select our brands when they decided to start
29 smoking, in those cases we were directing
30 marketing at consumers.

31 We didn't use 16 as an age cutoff. We
32 had a higher standard than that, which was

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1 21.

2 QUESTION: Then what use would that
3 information be?

4 ANSWER: It was an analysis of what was
5 happening in the marketplace.

6 QUESTION: Why would you need to know
7 about 16-, 17-, 18-, and in this particular
8 document, 15-year-olds?

9 ANSWER: The 15-year-olds, I don't know

10 where the 15 comes from. I'm not familiar
11 with any studies that collected information
12 on 15-year-olds.
13 QUESTION: So it is still your position
14 that Brown and Williamson tobacco never used
15 information pertaining to any Marketing
16 Research studies on age groups from 15 to 19;
17 is that correct?
18 ANSWER: The term never is difficult to
19 deal with.
20 QUESTION: We're looking at P-19 for
21 identification. Is this a Brown and
22 Williamson document?
23 ANSWER: Yes.
24 QUESTION: It is dated August 6th, 1985;
25 isn't it correct?
26 ANSWER: Yes.
27 QUESTION: What is that?
28 ANSWER: The Kool market development
29 program.
30 QUESTION: Okay. And if you turn to
31 Bates stamp Page Numbered 2275, table 1 has
32 total industry volume.

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1 ANSWER: I'm sorry. Table 2, table 1.
2 2275. It is out of sequence again.
3 QUESTION: There you go.
4 ANSWER: Okay. Got it.
5 QUESTION: What do we see here on table
6 1? We have age brackets, don't we?
7 ANSWER: We see age brackets.
8 QUESTION: And the age brackets here
9 start 15 years old; isn't that correct?
10 ANSWER: Yes.
11 QUESTION: In fact, there's a separate
12 bracket here of 15 to 19, correct?
13 ANSWER: Yes.
14 QUESTION: And they also look at the
15 daily consumption of smokers, whether they
16 are white or black, on a daily basis in the
17 age category of 15 to 19 years old, correct?
18 ANSWER: That's what it appears to do,
19 yes.
20 QUESTION: And it also looks at the
21 number of sticks a day. What's that mean?
22 ANSWER: That means cigarettes per day.
23 QUESTION: Okay. And also measures a
24 number of sticks per year; isn't that
25 correct?
26 ANSWER: Yes.
27 QUESTION: Why do you think all of these
28 people in Marketing Research want to know
29 about the daily and yearly consumption of
30 white and black smokers ages 15 through 19?
31 ANSWER: I don't know.
32 QUESTION: I have another document I

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1 want to show you. Will you mark this? If
2 you look on the conclusion page, it talks

3 about the third major opportunities for Kool
4 Superlight gains, and it says, should come
5 from the full taste 85 smokers and from
6 starters, young, parentheses, age 16 to 25.
7 Isn't that correct?
8 ANSWER: That's what it says.
9 QUESTION: And if you go further down,
10 it says, similarly, males account for 56
11 percent of the new menthol hi-fi 85 starters,
12 while smokers age 16 to 25 account for 36
13 percent and smokers age 16 to 40 account for
14 62 percent of the new menthol hi-fi 85
15 starters, correct?
16 ANSWER: That's what it says.
17 QUESTION: Basically, what they are
18 saying here is that Superlights, gains from
19 the sales of Superlights, are going to come
20 from starters, these young kids starting to
21 smoke, ages 16 to 25?
22 ANSWER: What I'm looking for is a date
23 here. This is '77. This is 1977. I'm
24 trying to put this in context regarding the
25 legal smoking age.
26 QUESTION: I'm not talking about the
27 smoking age. I'm talking about targeting a
28 young 16- to 25-year-old market with Light,
29 Superlight Kool cigarettes?
30 ANSWER: And my answer is based on the
31 timing of this document, the date of this
32 document.

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1 QUESTION: Well, let me ask you -- hold
2 on to that document and let me ask you a
3 question. Do you believe that the enter
4 linking of Marketing Research is seen as an
5 important future need of Brown and Williamson
6 tobacco as it designs and puts out new
7 products?
8 ANSWER: Yes.
9 (Conclusion of videotaped deposition
10 of Claudia Corky Newton.)
11 (Open court.)
12 MR. LOUIS GERTLER:
13 That would conclude the deposition of
14 Claudia Corky Newton, Marketing Research
15 executive of Brown and Williamson Tobacco
16 Corporation, and I think we've concluded our
17 proceedings today, Your Honor.
18 MR. RUSS HERMAN:
19 May it please the Court? Afternoon,
20 Your Honor. I'm sure learned counsel
21 opposite join me in wishing the staff, the
22 jury and Your Honor a very safe and happy
23 Mardi Gras.
24 THE COURT:
25 Thank you, Mr. Herman. Anything else
26 for the record by plaintiffs?
27 MR. RUSS HERMAN:
28 No, Your Honor.
29 THE COURT:
30 Defendants, anything for the record?

31 MR. WITTMANN:
32 No, Your Honor.
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1 THE COURT:
2 Before we recess, ladies and gentlemen,
3 let me remind you, I don't want you to
4 discuss this case or anything about this case
5 with anyone, including each other, relatives,
6 friends, news media, anyone. You are not to
7 read anything about this case or watch any
8 news report on television about this case, or
9 listen to any radio report about this case.
10 You are not to read anything on the internet
11 or use your computers to read or learn
12 anything about the case or any other tobacco
13 case. If anyone tries to contact you or
14 tries to talk to you about this case or any
15 other tobacco case or anything that has to do
16 with your jury service in this case, you are
17 instructed not to talk to that person about
18 this case or about your jury service.
19 Remember as much as you can about their
20 contact and report that contact to me or a
21 member of my staff when court resumes.

22 I want to thank you for your attendance
23 and your attention and join in Mr. Herman in
24 wishing you a happy and safe Mardi Gras.

25 When we get back from this little recess
26 we're taking, I'll have your work schedule
27 for starting June for several months after
28 June 1st, and we'll give you that just very
29 shortly after we reconvene.

30 We reconvene on March 10, a week from
31 Monday. We reconvene on March 10, 9:30, and
32 thank you again for your attendance. We'll

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1 look for you at 9:30 on March 10. You are
2 hereby discharged.

3 (Jury excused.)

4 THE COURT:

5 The jury has left the courtroom. I will
6 give counsel an opportunity to put anything
7 of record they'd like to put of record since
8 the lunch recess.

9 MR. RUSS HERMAN:

10 Nothing, Your Honor.

11 THE COURT:

12 Defense counsel?

13 MR. WITTMANN:

14 Nothing, Your Honor.

15 THE COURT:

16 We have scheduled for this point in
17 today's proceeding the argument of
18 defendants' objections to the Special
19 Master's report as to the claims of privilege
20 on document 2564.

21 MR. WILLIAMS:

22 Yes, Your Honor.

23 THE COURT:

24 Are you ready to proceed with that?
25 MR. WILLIAMS:
26 Yes, Your Honor.
27 MR. LOUIS GERTLER:
28 Your Honor, can you give me one minute
29 to grab the document?
30 I'm ready, Your Honor.
31 THE COURT:
32 Mr. Gertler, you're ready?
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1 MR. LOUIS GERTLER:
2 Yes, sir.
3 THE COURT:
4 I'll hear the objections to the Special
5 Master's report.
6 MS. BERTAUT:
7 Thank you, Your Honor. Your Honor,
8 we'll begin pursuant to the stipulation we
9 have in place, that this is with full
10 reservation of our rights to claim privilege
11 notwithstanding the plaintiffs' presence in
12 the courtroom. Your Honor, with that
13 understanding, this document is a July, 1963
14 memorandum written by Addison Yeaman, who was
15 then general counsel of Brown and Williamson.
16 The report is written on the eve of the first
17 Surgeon General's Report, and addresses
18 issues which the attorney anticipates will
19 have a profound impact on the litigation and
20 regulatory efforts concerning the company and
21 the tobacco industry in light of the expected
22 Surgeon General's report. Because the
23 memorandum was written by an attorney to
24 facilitate the rendition of his traditional
25 legal services, Brown and Williamson has
26 claimed attorney-client privilege.
27 The legal services at issue here, Your
28 Honor, is counseling by the attorney to a
29 client who was then embroiled in litigation
30 and facing the prospect of additional and new
31 legislation and regulation. Because the
32 document also reflects the attorney's mental
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1 impressions, B & W has claimed work product
2 as well.
3 Now, when we were before the Special
4 Master, the Master found that the document
5 was not privileged. B & W has objected to
6 this finding, Your Honor, because it is both
7 factually and legally erroneous in the
8 following regards.
9 First of all, the document was written
10 at a time when the industry, including B & W,
11 was a subject of a number of suits, and it
12 was written in anticipation that further
13 litigation was likely to follow. It
14 addresses the potential responses by the
15 company, indeed, the whole industry, to the
16 anticipated Surgeon General's initial report

17 and assesses the likely impact on litigation.
18 And if you will, Your Honor, there are a
19 number of passages in the document that
20 reflect classic attorney work product. For
21 example, if you look on Page 2, the attorney
22 is reflecting on the possible creation of a
23 collaborative research effort between his
24 client and public health entities which,
25 "might worsen our situation in litigation."
26 On Page 2 again, the attorney cautions the
27 company, his client, against, "giving
28 assurance to the smoking public not supported
29 by research evidence."

30 On Page 2, he continues by anticipating
31 the legislation and regulatory reaction that
32 is sure to follow with the expected Surgeon

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1 General's Report. In particular, he
2 speculates, that there will be broader and
3 tougher FTC regulations regarding cigarette
4 advertising, including his accurately
5 predicting that there will be a ban on TV and
6 radio advertising which was -- which actually
7 came to pass at the end of the decade. He
8 also foresaw the federal Cigarette Labeling
9 Act and foresaw that there would be power
10 given to the FTC to enjoin cigarette
11 advertising.

12 Finally, he also reflects on the strong
13 possibility that it will be the passage of
14 new legislation increasing taxes on the
15 client's products.

16 Continuing on Page 3, the lawyer
17 references possible state legislation. He
18 addresses on that page how potential
19 responses by the company to the Surgeon
20 General's Report will affect the smoking and
21 health litigation the company has faced. In
22 doing so, he chronicles the smoking and
23 health litigation to date and the role the
24 assumption of risk has played in the
25 company's defense of those cases.

26 He hypothesizes how a package warning
27 might impact the litigation and the
28 affirmative defenses available to the
29 company, specifically mentioning both
30 assumption of risk as well as comparative
31 negligence.

32 These are pure legal terms of art, Your
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1 Honor, that the attorney is referencing. He
2 speculates as to how future juries might
3 respond in the presence of a warning label in
4 a -- if a subsequent lawsuit is brought, and
5 he concludes that the litigation will be
6 complicated, no doubt, by the Surgeon
7 General's Report and the sequela of that
8 report.

9 Now, all of this, Your Honor, is classic

10 attorney thought processes concerning the
11 impact on pending and threatened litigation
12 and the probable regulatory efforts that the
13 company, his client, will face, and as such,
14 this is all protected by attorney-client
15 privilege and work product.

16 Now, no doubt, Your Honor, plaintiffs
17 will argue before you as they did with the
18 Special Master, that the attorney, including
19 a discussion on Research and Development --
20 Research and Development developments are
21 indeed developments, both as to filter
22 development and research undertaken by the
23 Battelle Institute, and that was undertaken
24 for the sister company, BAT, somehow voids or
25 negates the attorney mental impressions here,
26 but the discussion in the document as to
27 these are indeed a development event, are
28 simply putting the legal opinions and
29 recommendations into the proper context of
30 the time, and they don't void what is
31 unquestionably traditional legal counsel
32 afforded by an attorney to his client.

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1 So, for all these reasons, Your Honor,
2 we respectfully suggest that the Special
3 Master erred in finding that this was not
4 privileged as either work product or
5 attorney-client.

6 If you have some questions, I will
7 answer them, or attempt to.

8 THE COURT:

9 I don't have any questions.

10 MR. BERTAUT:

11 Thank you, Your Honor.

12 MR. LOUIS GERTLER:

13 Your Honor, as you're, I'm sure, very
14 aware, Article 506 of the Code of Evidence
15 states that attorney-client privileged
16 material must be made for the purpose of
17 facilitating the rendition of professional
18 legal services. This document was clearly
19 not done to do so. How do I know that, Your
20 Honor? First of all, Mr. Yeaman was not just
21 general counsel of Brown and Williamson. He
22 was also vice president. And as vice
23 president, when you actually read this memo,
24 it's obvious that he's talking about how he
25 can save or how the industry, the tobacco
26 industry, can save itself in light of the
27 forthcoming 1964 Surgeon General's Report.
28 Very, very rarely in this memo, which is
29 allegedly advice to his client, does he ever
30 mention Brown and Williamson. Instead, as
31 you can see in the memo, he talks about, for
32 example, on Page 1, the two things the

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1 industry must do, he talks on Page 2 about
2 freeing the industry to meet the attack. He

3 also mentions on Page 2 as long as the
4 industry does not assume its research
5 responsibility. And then he goes on to talk
6 about the effects that the Surgeon General's
7 report will have on the industry as a whole
8 and how they can respond and only very
9 briefly does he even mention the legal
10 ramifications of the Surgeon General's
11 report. Most of the time, he talks about the
12 public relations and legislative impact of
13 that report. In fact, he even mentions on
14 the top of Page 2 about how they can use the
15 TIRC, which is, as you're aware, Your Honor,
16 is the forerunner of CTR and TI to help the
17 industry, but he mentions that it's just a
18 public relations gesture and its function is
19 a public relations operation, therefore, it
20 can't really be of much help to the industry.

21 The second important thing, Your Honor,
22 is that the title of the document itself --
23 the title is Implications of the Battelle
24 Hippo I and II and the Griffith filter.
25 Those are two scientific studies, Your Honor,
26 not legal studies, that were conducted by
27 B & W's then parent company in England. He's
28 talking about the implications of these
29 science studies on the industry's position.
30 That's the purpose of this memo. That's why
31 he mentioned the two things in the very title
32 of this memo. Therefore, it's clearly not a

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1 memo being used to facilitate the rendition
2 of professional legal services, and the
3 Special Master was absolutely correct in
4 finding that.

5 Second, Your Honor, crime-fraud, besides
6 what I mentioned about his open admission
7 about TIRC is just a public relations machine
8 that has nothing to do with real scientific
9 research, let me read you the quote from Page
10 3, "Moreover --" now, remember, Your Honor,
11 this is 1963 -- "Moreover, nicotine is
12 addictive. We are then in the business of
13 selling nicotine, an addictive drug effective
14 in the release of stress mechanisms."

15 This is an open admission, Your Honor,
16 in 1963, by a vice president of Brown and
17 Williamson Tobacco Corporation that nicotine
18 is an addictive drug and that's the business
19 that they are in. They wouldn't even admit
20 that nicotine was addictive to the public
21 until almost 25 -- 35 years later, in the
22 late '90s. This demonstrates, Your Honor,
23 and furthers a fraud of concealing their own
24 private knowledge about nicotine and its
25 addictive qualities while telling the public
26 on the other hand that we just use nicotine
27 for taste and it's not really addictive, it
28 may just be habit-forming, kind of like
29 biting your fingernails. This is a
30 quintessential fraud document, Your Honor,

31 and the reason I talked to you previously
32 about not being made for the reason of
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1 facilitation of legal services. This
2 document is not entitled to any legal
3 privilege.

4 MR. RUSS HERMAN:

5 Your Honor, one second, please. I need,
6 as an officer of the court, to call the
7 attention of Your Honor to the latest ruling
8 of the Louisiana Fourth Circuit Court of
9 Appeal on this issue. I have to get you the
10 cite, but I read in Levy cites, and I think I
11 threw it in my briefcase, or in the Maralist
12 Reporter, that the Fourth Circuit just ruled
13 that even if the document is privileged, it
14 may nevertheless be used for impeachment. I
15 don't know to what extent that would bear on
16 this issue, but I think it is important that
17 Your Honor be familiar with it.

18 THE COURT:

19 Thank you. I'll research the issue and
20 I feel we'll find it. Thank you for bringing
21 it to my attention.

22 You wish to rebut?

23 MS. BERTAUT:

24 Very briefly. First of all, Special
25 Master did not find this document evidence of
26 crime-fraud. So, that's not before the
27 Court. What's before the Court is the
28 conclusion by the Special Master that they
29 cannot show this document.

30 Secondly, even if such a conclusion were
31 before the Court, this is not evidence of
32 crime-fraud, Your Honor. This is the

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1 client -- this is the counsel opining on his
2 views of the subject. Battelle Hippo I and
3 II was a research document out of BATCO that
4 talked about the beneficial effects of
5 smoking.

6 Finally, Your Honor, the contention that
7 somehow by commenting on scientific research
8 this attorney no longer was performing the
9 rendition of legal services to his company
10 when he speculated as to how that might --
11 how the rendition of scientific reports might
12 affect litigation is belied by this entire
13 trial. We have spent five weeks, Your Honor,
14 talking about scientific research, and it
15 most definitely plays a role in smoking and
16 health litigation. So, to use that when
17 discussing scientific research does not
18 negate the attorney-client counsel role here.

19 Finally, we understand all we're doing
20 here today is addressing our objection to the
21 Special Master's report. We are not
22 addressing evidentiary objections other than
23 privilege that we certainly do have to this

24 document and will respond to Mr. Herman's
25 comments when those objections are invited by
26 the Court.

27 THE COURT:

28 I will take the objections to Mr.
29 Gianna's report under advisement. I
30 understand you intend to use or attempt to
31 use this document with the first witness
32 on -- is it March 10 or March 11?

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1 MR. LOUIS GERTLER:

2 Yeah, March 10, Your Honor, Dr.
3 Benowitz. We may use this document. It's
4 explicitly mentioned in his report.

5 THE COURT:

6 It's March 10 that he's scheduled, Mr.
7 Herman?

8 MR. RUSS HERMAN:

9 Yes, Your Honor.

10 THE COURT:

11 Fine. I will rule at the beginning of
12 that day on the objections to Special Master
13 Gianna's report.

14 THE COURT:

15 Please remember my instructions about
16 your communications with Mr. Gianna on
17 Benowitz's demonstrative aids and exhibits.

18 MR. RUSS HERMAN:

19 Get that to you tomorrow, I thought.

20 MR. LOUIS GERTLER:

21 No. Tomorrow or next Thursday.

22 THE COURT:

23 Next Thursday.

24 MR. RUSS HERMAN:

25 Next Thursday.

26 MR. COPLEY:

27 Next Thursday.

28 MR. MICHAEL GERTLER:

29 By next Thursday.

30 MR. LOUIS GERTLER:

31 By next Thursday.

32 THE COURT:

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1 Have a nice week.

2 (Whereupon, the proceedings are
3 adjourned at 2:54 p.m.)
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I, CAROL VALLETTE SLATER, Certified Court
Reporter, Registered Professional Reporter, do
hereby certify that the foregoing proceedings were
reported by me in shorthand and transcribed under my
personal direction and supervision, and is a true
and correct transcript, to the best of my ability
and understanding;

That I am not of counsel, not related to
counsel or the parties hereto, and not in any way
interested in the outcome of this matter.

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